84-1108

Office - Supreme Court, U.S.
FILED
APR 6 1985
ALEXANDER L. STEVAS,
CLERK

No._____

IN THE

Supreme Court of the United States

October Term, 1984

JOHN R. WENTURINE,

Petitioner,

vs.

SEVEN SPRINGS MOUNTAIN RESORT, INC., and the BOROUGH OF SEVEN SPRINGS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[CA-3 No. 83-5742]

GERARD J. CIPRIANI
MAZZOTTA & WINTERS, P.C.
Attorneys for Respondents
2620 One Mellon Bank Center
Pittsburgh, Pennsylvania 15219
(412) 471-0300

Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

BEST AVAILABLE COPY

TABLE OF CONTENTS OF BRIEF.

Page

Table of Citations i

Statement of Case 1

Summary of Argument 4

Argument:

The Petitioner has failed to substantiate his belief that this matter warrants this Honorable Court's attention in that neither the applicable law is in dispute nor the Appellate Court's application of the law to the facts as established in the record 5

Conclusion 8

TABLE OF CITATIONS.

CASES:

Hudgens v. National Labor Relations Board, 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed.2d 196 (1976) .. 7

Landrigan v. City of Warwick, 628 F.2d 736 (1st Cir. 1980) 7

Marsh v. Alabama, 326 U.S. 501, 66 S. Ct. 276, 90 L.Ed. 265 (1946) 7

Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L.Ed.2d 492 (1961) 6

Reed v. Philadelphia Housing Authority, 372 F. Supp. 686 (E.D. Pa. 1974) 7

IN THE

Supreme Court of the United States

October Term, 1984

No._____

JOHN R. WENTURINE,

Petitioner,

vs.

SEVEN SPRINGS MOUNTAIN RESORT, INC., and the BOROUGH OF SEVEN SPRINGS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[CA-3 No. 83-5742]

Statement of Case

The Petitioner has filed a brief in support of his petition for certiorari which more closely resembles a brief on the merits. Petitioner no where indicates that the decision rendered by the Federal Court of Appeals is in conflict with a decision of another Federal Court of Appeals on the same issue. Moreover, Petitioner fails to

aver that prior decisions in the instant matter were resolved in conflict with the Court of last resort of the Commonwealth of Pennsylvania. Additionally, there is no claim offered by the Petitioner that the Federal Court of Appeals for the Third Circuit has departed from the accepted and usual course of judicial proceedings.

Respondent believes that the misstatements in Petitioner's rendition of the facts require commentary. The Petitioner filed with the District Court a civil rights action against Richard A. Parfett, a police officer with the Borough of Seven Springs who apparently also acted as a security guard for the Seven Springs Mountain Resort, Inc. The Petitioner also brought an action against the Borough Seven Springs, a municipality, and the Seven Springs Mountain Resort, Inc., a private corporation. Upon receipt of the Complaint, the municipality and the private corporation, respondents herein, filed a Motion to Dismiss. The Trial Court sustained the motion with respect to the Borough on June 4, 1981 and with respect to the Resort on November 25, 1981 entering a final Order on October 12, 1983.

Factually, Petitioner was a patron at the resort on December 31, 1978 when he was confronted by Officer Parfett. While facilitating the arrest of the Petitioner for disorderly conduct, Parfett allegedly pushed the Petitioner causing injury to him. Petitioner clearly and distinctly states in his Complaint that solely as a result of the actions of Parfett, acting on behalf of both the Borough and the Resort, the Petitioner suffered damages.

Petitioner further alleged that the officer was acting under color of statute and ordinances pursuant to the Borough and the Commonwealth of Pennsylvania. The resort is identified solely as a corporation doing business in Pennsylvania. The record which this Court has before it consists solely of Petitioner's Complaint, the Motion to Dismiss and any judicial admissions contained in the bench opinion delivered by the Court on November 25, 1981. Statements made by counsel for any party to this action concerning factual matters must be disregarded by this Court unless contained in Petitioner's original Complaint.

Summary of Argument

The decision below was in accordance with well-accepted principles of law as set out by this Court and other federal courts. In order to recover on an action against the Borough of Seven Springs, Petitioner must allege a formal or informal policy whereby the Borough authorized or ratified the alleged misconduct of Officer Parfett. This has never been alleged of record although Petitioner has inappropriately set forth these misstatements in his brief.

Petitioner now attempts to add facts to his Complaint in order to establish liability on the part of the Resort which he failed to aver within the time allowed for doing so. Moreover, Petitioner has failed to allege any facts which, if proven, would allow recovery against the resort on the theory that it is a *de facto* municipal corporation. Therefore, there is no question of law at issue which justifies the granting of a Writ of Certiorari.

Argument

The facts upon which Petitioner bases his position are set forth solely in the Complaint filed by the Petitioner to initiate this litigation. A reading of that Complaint clearly demonstrates the liberty taken by the Petitioner in the facts set forth in his brief in support of his petition for certiorari. While Respondents question the accuracy of several holdings as cited by the Petitioner, embellishments with the factual rendition of the Petitioner necessitate even greater scrutiny. A reading of the Complaint and the case law cited in support of Wenturine's petition make it clear that not only has Petitioner failed to overcome the burden placed upon all petitioners for certiorari, he has failed to establish a discrepancy in the decisions of the lower courts.

With respect to the municipality, relevant facts are set forth in Paragraph 14 of Petitioner's Complaint wherein it is stated that:

> "As [a] direct proximate result of the aforesaid acts of Defendant Richard A. Parfett acting on behalf of the other Defendants, Plaintiff John R. Wenturine suffered great bodily pain and injury and mental anguish, from then until now, and he will continue to suffer in the future; he has lost and will continue to lose large sums of money by reason of having been greatly humiliated and held up to the public scorn of derision as a result of the foregoing acts of the Defendants." See Exhibit F, appendix p. 18.

No where is it alleged that Petitioner suffered injuries and damages as a result of the inaction of either employees or high officials of the Borough of Seven Springs. The causation Paragraph, Paragraph 14 of Petitioner's Complaint, is based solely on the doctrine of *respondeat superior* with respect to both the Borough of Seven Springs and Seven Springs Mountain Resort, Inc.

Therefore, contrary to the piecemeal and inaccurate fact situation set forth in Petitioner's brief, the lower court correctly determined that the municipality cannot be vicariously liable for the inactions of an employee. *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L.Ed.2d 492 (1961).

The Petitioner also argues that the officer was advancing a policy of the Resort or the municipality when he allegedly assaulted Wenturine. Not only did Petitioner fail to allege this in his Complaint, counsel for Petitioner stated in response to a question by the Court on this issue, that "... we don't have that type of evidence. That's why it wasn't alleged." See App. p. 43, l. 8. It is Respondent's position that this judicial admission by Petitioner's representative makes it abundantly clear that the record does not support Petitioner's claims.

With respect to the actions of the Resort, a factual review will once again demonstrate that the Petitioner is not claiming a conflict of rulings of Federal Courts or, at the minimum, a misapplication of the settled law. On the contrary, Plaintiff's argument is entirely factual and one not supported by the record.

Petitioner's Complaint merely alleges that Seven Springs Mountain Resort, Inc. is "... a corporation doing business in Pennsylvania." See App. p. 13, Paragraph 5 of Petitioner's Complaint. Factually, at no time did Petitioner allege that the officer was acting under color of law with respect to Seven Springs Mountain Resort, Inc., nor was it alleged that the resort was, in fact, a *de facto* municipality. While certainly Respondents do not question to any great extent the law cited by the Petitioner, the facts do not exist to support

Petitioner's allegations. Consistent with cases such as *Hudgens v. National Labor Relations Board*, 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed.2d 196 (1976), and *Marsh v. Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L.Ed. 265 (1946), the record shows that the resort was never alleged to be anything more than a resort.

Finally, pendant jurisdiction is a discretionary matter for the trial court to consider, *Landrigan v. City of Warwick*, 628 F.2d 736 (1st Cir. 1980), and *Reed v. Philadelphia Housing Authority*, 372 F. Supp. 686 (E.D. Pa. 1974). Appellate Courts have a very limited scope of review over discretionary matters and, Petitioner prays that there is no overriding necessity to granting Certiorari on this issue nor has there been a showing of any clear abuse of discretion.

Conclusion

For reasons set forth above, Respondents, the Borough of Seven Springs and Seven Springs Mountain Resort, Inc., request this Court deny the petition for writ of certiorari.

Respectfully submitted,

GERARD J. CIPRIANI
MAZZOTTA & WINTERS, P.C.
Attorneys for Respondents
Borough of Seven Springs, Inc. and
Seven Springs Mountain Resort

MAZZOTTA & WINTERS, P.C.
2620 One Mellon Bank Center
Pittsburgh, Pennsylvania 15219
(412) 471-0300